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Supreme Court of the United States

OCTOBER TERM, 1962

No. 3[redacted]

LIBERIAN CARRIERS, INC. and R. J. CHIANELLI,

Petitioners,

—against—

TAMPA SHIP REPAIR & DRY DOCK CO., INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 232

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Preliminary Comment

The opinion of the Court of Appeals for the Second Circuit in the three cases involved in this litigation is reported at 301 F. 2d 462, 1962 A. M. C. 626. The Rule under which the petitioners request the writ is now numbered 19.1(b). Although the petition omits name and date (Pet. A20), District Court Judge Fred J. Wham, before whom the cases were tried, signed the findings and conclusions on June 6, 1961. The exhibit printed in the petition under the designation "Second Contract" (Pet. A24-30) is not the "Conversion Contract" executed by Liberian Carriers, Inc. (hereinafter referred to as "Owner"), and Tampa Ship Repair & Dry Dock Co., Inc. (hereinafter referred to as "Shipyard"), December 27, 1956, but a preliminary draft thereof. We are unable to understand some of the references in the petition, for example "Appendix pages 209-226, 459-08" (Pet. 14).

Facts

Petitioners' statement of the facts (Pet. 3-6) gives an erroneous impression of the findings of the District Court as confirmed *in toto* and verbatim by the Court of Appeals.

The District Court found as fact that the parties intended that the "Conversion Contract" of December 27, 1956, should supersede the memorandum of November 16, 1956 (Finding of Fact 2, Pet. A13-14). It found as fact that the Shipyard had done the work called for by the "Conversion Contract" in accordance with the standard of performance bargained for by the parties and stated in the contract (Finding of Fact 3, Pet. A14) and without delay for which the Shipyard might be held responsible under the terms of the contract (Finding of Fact 10, Pet. A16; Conclusion of Law 5, Pet. A19).

The District Court found as fact that the detention by the Shipyard of the vessel after completion of the work was in lawful exercise of its statutory lien, not as a form of economic duress, and that the parties had come to a compromise agreement by which Liberian had waived any claim it might otherwise have had for damage on account of delay or defective work (Findings of Fact 8, 9 and 12, Pet. A15-17).

Finally, it found as fact that the Owner had failed to sustain the burden of proving a causal relationship between difficulties of operation it claimed to have had and faulty workmanship. Rather, it found the evidence convincing that such difficulties arose largely, if not altogether, by reason of mishandling by an incompetent crew (Finding of Fact 13, Pet. A17).

POINT I

The questions suggested by petitioners as a basis for the granting of the writ are academic because the District Court found the parties had entered into a settlement agreement completely disposing of their differences, the Court of Appeals did not disturb this finding and no attack is made on the finding in this Court.

Contrary to petitioners' assertion (Pet. 2), the Shipyard did not cross-claim for the balance claimed due under the contract for the reengining of the vessel, but for the balance, plus interest and collection charges, due on a note made by the Owner and endorsed by R. J. Chianelli and J. F. Swenson, President and Vice-President, respectively, of the Owner. The face amount of the note was not the amount the Shipyard had claimed was due under the contract but a compromise figure agreed to by Liberian as part of what the District Court concluded was an accord and satisfaction of all existing claims (Finding of Fact 8, Pet. A15-16; Conclusion of Law 4, Pet. A19).

Upon completion of the work, the Shipyard demanded payment and, not receiving it, exercised its lien under the Maritime Lien Act of 1920, 46 U. S. C. 971, whereupon, Chianelli sent the President of the Shipyard the following telegram (Lib. Ex. 80):

"SAM F DAVIS PRESIDENT

YOUR LETTER DATED APRIL 26 LIBERIAN CARRIERS, INC. DISPUTE APRIL 16 AS COMPLETION TIME ALSO DISPUTE OVERTIME FIGURE OF 36410 DOLLARS ALSO DISPUTE ADDITIONAL ITEMS 12611.75 STOP MC CHIA-

NELLI WILL ARRIVE TAMPA FRIDAY FINAL-
IZE BILL CONCERNING REENGINING ALPHA
R. J. CHIANELLI INC. AS AGENTS
LIBERIAN CARRIERS INC."

Subsequently, Chianelli and Davis reached the agreement in Tampa which the District Court held constituted an accord and satisfaction. The Shipyard released the vessel, reduced the price and in lieu of a cash payment of the entire compromise price, accepted a note payable in six installments. For its part, the Owner did not "purport" to accept the work as the petitioners assert (Pet. 6); the note expressly states "$48,825.75 represents the balance due on the work performed by the above Shipyard on the S.S. 'ALPHA', which work has been approved and accepted by the owners" (Lib. Ex. 17). Approximately a month after release of the vessel, the Owner paid the first installment due on the note (Res. Ex. S).

The Court of Appeals not having disturbed either the finding or the conclusion, the questions suggested by petitioners as basis for issuance of a writ are wholly academic.

POINT II

There is no question of the scope of appellate review in these cases because the Court of Appeals affirmed, leaving the District Court's findings and conclusions intact.

Contrary to petitioners' repeated assertion, the Court of Appeals made no additional finding of fact. It left the District Court's findings and conclusions undisturbed. What it did in its opinion was to refer to evidence in the record not specifically mentioned by the District Court to sustain one of the District Court's findings the petitioners had challenged in the Court of Appeals.

The matter to which the petitioners' question is directed is the Owner's claim for damages for delay in completing the work. This matter was referred to in Chianelli's telegram quoted above at pages 3-4. Certainly if any claim failed to survive the compromise agreement, this did.

Be that as it may, however, what the petitioners are trying to do in posing their question is to elevate a problem of language to the level of a problem of substance.

The provision of the "Conversion Contract" with respect to the inner bottom plating is quoted in the opinion of the Court of Appeals, (Pet. A3-4). The work could only be done after the old machinery had been taken out and before the new was installed (App.[1] 216, 223, 476, 453).

The Shipyard's production manager, who said he had been doing steel work in the bottoms of ships all his life, testified that the work had actually taken 21 working days (App. 453). Contrary to petitioners' contention, therefore, there is ample competent evidence as to the delay occasioned by work on the inner bottom plating between the removal of the old machinery and the installation of the new. The Court of Appeals merely held that this was sufficient to sustain the District Court's finding and conclusion that there was no delay in completion of the work for which the Shipyard could be held responsible.

[1] "App." refers to appendix to appellants' brief in the Court of Appeals.

POINT III

The questions of contract construction posed by the petitioners are of interest, if at all, only to the parties to a private contract.

It would take a good deal more imagination than respondent possesses to understand how the public of a world glutted with ships can have the slightest interest in the prompt return of a particular ship to commercial use. However that may be, the Court of Appeals' interpretation of the contract is patently correct. Petitioners profess to see no difference between what they refer to as "other extras" (Pet. 18) and work on the inner bottom plating, but the very nature of the work of modifying existing floors, etc., is such that obviously it was an integral part of the reengining of the vessel and within the contemplation of the parties that it had to be done no matter what time was required.

One cannot argue with a contention that Classification Society surveyors should be attentive to and diligent in their work. If they are not, they fail to serve the purpose of supplying the expert judgment of operational fitness for which the owners engage them. What the Owner bargained for in this instance was to have the machinery put in such condition that a Lloyd's surveyor would consider it in operating condition. It did not want what just anyone thought was operating condition, but what a Lloyd's surveyor thought. That is what it was contractually entitled to and what it got. See *Compagnia Italiana Trasporto Olii Minerali* v. *Sun Oil Co.* (C. A. 2), 43 F. 2d 683. There was no contention, let alone proof, of fraud in obtaining the approval. If Lloyd's itself had been negligent, and the District Court expressly found to the contrary (Finding of

Fact 4, Pet. A15), the Owner's cause of action would have been against Lloyd's. *See American Bureau of Shipping v. Allied Oil Co.* (C. A. 6), 64 F. 2d 569.

The express language of the "Conversion Contract" furnishes the complete answer to petitioners' complaints with respect to the attendance of surveyors. It provides, "It is agreed that the Owner will furnish the services of a Lloyd's Surveyor and bear the fees of all classification inspection and certificates" (Lib. Ex. 1). If the Owner wanted to put the onus on the Shipyard to insure Lloyd's Surveyor's attendance when it thought he should be there, it should have bargained for a different contract clause. The public has no interest in this.

There is ample evidence in the record of the trial of these cases to indicate the memorandum of November 16, 1956, was completely ignored by all concerned until the Owner sought to make it a basis for claim in this litigation. Whether or not it was enforceable as a contract if the superseding "Conversion Contract" had not been executed is debatable, although, of course, moot. There is testimony to indicate that it was supposed to serve only as a binder on the boilers and to give Chianelli something in writing to show his partners what sort of a contract might be obtained (App. 16-17, 473). The memorandum had been dictated by him (App. 473). In signing the memorandum, including the statement about speed, the Shipyard's people were thinking in terms of what the engines might do in a Liberty ship hull. They had no idea of the lines of the "ALPHA's" hull (App. 474). When they had had a chance to study plans and inspect the hull, they knew they could not make any guarantee of speed attainable, did not do so in the "Conversion Contract", and were not asked to do so (App. 427). Before the "Conversion Contract" was signed, Chianelli made his own investigation as to what speed might be at-

tained. His own Naval Architect doubted that 10 knots, without a reduction gear, could be expected (App. 224).

The simple fact is that the parties treated the memorandum of November 16, 1956 as a nullity almost as soon as it was signed, because they at once began to negotiate the final "Conversion Contract". Chianelli, himself, in writing, referred to the latter as a "superceding" (sic) agreement (Lib. Ex. 2, p. 5) despite his oral testimony at the trial, which Judge Wham obviously did not believe.

POINT IV

The petitioners have failed to show any reason why a writ of certiorari should be granted under Rule 19.1 (b) and the petition should be denied.

Respectfully submitted,

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